United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2412 B Pgs 6

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2412

UNITED STATES OF AMERICA,

Appellee,

vs.

KENNETH OLIVER

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK (HON. JOHN T. CURTIN PRESIDING)

BRIEF FOR APPELLANT

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RULES

Title 18 USC 2113

Bank Robbery and Incidental Crimes

2113(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association;or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny --

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or

imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

***

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

SECOND CIRCUIT RULES REGARDING PROMPT DISPOSITION OF CRIMINAL CASES

Promulgated January 5, 1971
Amended May 24, 1971

The Circuit Council of the Second Circuit in the exercise of its supervisory power over the administration of justice in the federal courts of the circuit, and pursuant to its powers under 28 US Code §332, hereby promulgates the following rules for observance in the district courts of the circuit, commencing six months from the date of this announcement:

1. Priorities in scheduling criminal cases.

Insofar as is practicable:

(a) the trial of criminal cases shall be given preference over civil cases, as provided by Rule 50, Federal Rules of Criminal Procedure; and

(b) The trial of defendants in custody and defendants whose pre-trial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases.

2. The United States Attorney of each district shall file every two weeks with the chief judge of the circuit, and the chief judge of his district, a report of all

persons held in jail prior to trial, the period of detention, and the reason for such detention or delay in the disposition of charges pending against them. As to all other criminal cases the United States Attorney shall make a similar report monthly regarding each case in which the trial has not commenced within six months of the date of arrest, service of summons, detention, or the filing of the charge for which the defendant is to be tried, whichever is earliest.

3. In cases where a defendant is detained, the government must be ready for trial within ninety days from the date of detention. If such government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant shall be released upon bond or his own recognizance or upon such other conditions as the district court may determine, unless there is a showing of exceptional circumstances justifying the continued detention of the defendant, and that the detention shall continue only for so long as is necessary. This shall not apply to any defendant who is serving a term of imprisonment for another offense, nor to any defendant who, subsequent to release under this rule, has been charged with another crime or has violated the conditions of his release.

4. In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under Rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

5. In computing the time within which the government should be ready for trial under rules 3 and 4, the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pretrial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

(b) The period of delay resulting from a continuance granted by the district court at the request of, or with the consent of, the defendant or his counsel. The district court shall grant such a continuance only if it is satisfied that

postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent.

(c) The period of delay resulting from a continuance granted at the request of a prosecuting attorney if:

(i) The continuance is granted because of the unavailability of evidence material to the government's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or

(ii) the continuance is granted to allow the prosecuting attorney additional time to prepare the government's case and additional time is justified by the exceptional circumstances of the case.

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown and in addition he is attempting to avoid apprehension or prosecution or his location cannot be determined by due diligence. A defendant should be considered unavailable whenever his

location is known but his presence for trial cannot be obtained by due dilgence.

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

(f) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

(g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(h) Other periods of delay occasioned by exceptional circumstances.

6. If the defendant is to be retried following a mistrial, an order for a new trial, or an appeal or collateral attack, the time shall run from the date when the order occasioning the retrial becomes final.

7. If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state or other institution or that of another jurisdiction, it is his duty promptly:

(a) to undertake to obtain the presence of the prisoner for plea and trial; or

(b) when the government is unable to obtain the presence of the defendant, to cause a detainer to be filed with the official having custody of the prisoner and request him to advise the prisoner of the detainer and to inform the prisoner of his rights under these rules.

8. A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. However, failure of a defendant to move for discharge prior to plea of guilty or trial shall constitute waiver of such rights. The preceding sentence shall not apply to a defendant without counsel unless he has notice of these rules.

9. The district courts may implement these rules in any manner not inconsistent therewith.

STATEMENT OF ISSUES

1.) Whether the United States Attorney complied with the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases.

2.) Whether Linda C. Oliver voluntarily consented to the warrantless search of her automobile and her home.

3.) Whether the stipulation entered into supports a finding of guilt under Count III of the Indictment.

4.) Whether the stipulation entered into supports a finding of guilt under Count I of the Indictment.

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction following a non-jury trial. (A-68) The defendant was convicted on all three Counts of Indictment #1973-269 charging violations of subsections (a) (b) and (d) of Section 2113 of Title 18. (A-39 - 58)

On July 13, 1972 the defendant was arrested by the FBI in Michigan on charges stemming from a robbery which occurred in Buffalo on July 12, 1972. (A-5) The defendant was thereafter released and a removal hearing was scheduled. (A-5) While this hearing was pending, the defendant was arrested on October 13, 1972 in Michigan on charges unrelated to this litigation. (A-7) Thereafter, on October 20, 1972, the removal hearing involving the Buffalo matter was dismissed. (A-6) The defendant remained in custody continuously from October 13, 1972 to the present time. (A-1 - 9) The Michigan charges were prosecuted and concluded with a trial starting on June 5, 1973 and concluding on June 14, 1973. (A-8) The defendant was found guilty and was sentenced on June 25, 1973. (A-8)

During the entire period of time from October 13, 1972 until June 25, 1973, it is apparent that the United

States Attorney was aware of the whereabouts of the defendant. On one occasion in March 1973, he obtained a Writ of Habeas Corpus Ad Prosequendum which apparently was never served. (A-1) On January 17, 1973, the defendant, through his attorney, urged that he be afforded his full rights. (A-70 - 72) Notwithstanding this, the defendant was not returned to the Western District of New York for prosecution until July 30, 1973. (A-3) The defendant had been under Indictment for this offense since December 5, 1972 and a superseding Indictment had been returned on July 25, 1973. (A-1 & 3) The only change in the Indictment was that the Government in the superseding Indictment alleged that the victim was the bank manager rather than a bank teller. (A-10 - 15)

The defendant was arraigned in Western New York without counsel on July 30, 1973, and re-arraigned with counsel on August 13, 1973. (A-3) A plea of not guilty was entered on both occasions. (A-3)

Omnibus Motions were made and a suppression hearing was held on October 9, 1973. (A-3) Because of Judge Henderson's death in February of 1974, the matter was transferred to the Honorable John T. Curtin. Shortly thereafter

the defendant informed the court that he desired to retain his own lawyer to represent him in this litigation. (A-3) On June 1, 1974 the court signed an Order relieving the assigned counsel of responsibility, and noted the appearance of the defendant's retained counsel. Motions to suppress the statements and evidence seized were decided adversely to the defendant on July 10, 1974. (A-4) On September 10, 1974, trial of the defendant was commenced, and on September 11, 1974, the defendant consented to proceed without jury. (A-4) A stipulation was thereafter entered into. (A-27 - 38)

On September 26, 1974, the defendant was found guilty of three counts of violating Title 18 USC 2113, (A-4, 39 -58) and on October 25, 1974 was sentenced to 15 years on Count I, 10 years on Count II, and 15 years on Count III of the Indictment. (A-4, 59 -68) A timely notice of appeal was filed on October 25, 1974. (A-4)

STATEMENT OF FACTS

On the morning of July 12, 1972, Lynn Otterman, an employee of the North Elmwood Branch of the Manufacturers and Traders Trust Company, was approached by a Negro male. (A-34) The man was driving a Camaro automobile and had followed Otterman to work. (A-34) He displayed a gun to Otterman and, after questioning her about the bank's security, directed her to enter the bank with him. (A-34) Upon entering the bank the man went to the desk of the bank manager, Donald Warren, and instructed the employees to go into the vault. (A-35) Warren recognized the gun as a .45 caliber automatic. (A-36) The employees followed the man's instructions to empty money into two bags that he had carried into the bank. (A-37) He then left the bank. (A-35)

Following a report that the automobile the Negro male drove carried Michigan plates, agents from the Federal Bureau of Investigation traced the automobile registration to 1042 Stafford Place, Detroit, Michigan. (A-90) They made several spot checks on July 12, 1972, but could not locate the automobile. (A-99) On the morning of July 13, 1972,

the agents again went to 1042 Stafford Place and approached the residence. (A-99) They were met by Linda Oliver, and, after identifying themselves, asked her about her automobile. (A-109 - 110) The agents then verified that it was the automobile they were seeking. (A-110) After conducting a warrantless search of the automobile, allegedly with the consent of Linda Oliver, (A-111 - 112) the agents returned to the home and, shortly thereafter, discovered that another person was upstairs. (A-105 - 106) They ascended the stairs and arrested Kenneth Oliver, who promptly made several damaging statements. (A-106) As a result of these statements, $30,000 in cash, several Manufacturers and Traders Trust Company money wrappers and deposit slips, a Buffalo, New York, street map, and other items were found in the house. (A-28 - 31) An unloaded .45 caliber automatic pistol was found in the garage. (A-32) The defendant was then transported to the FBI Office. Thereafter he was brought before a United States Magistrate for the Eastern District of Michigan where proceedings involving bail and a removal hearing were commenced. (A-5)

ARGUMENT

POINT I

THE UNITED STATES ATTORNEY FAILED TO COMPLY WITH THE SECOND CIRCUIT RULES REGARDING PROMPT DISPOSITION OF CRIMINAL CASES; THE DEFENDANT ACCORDINGLY WAS DENIED HIS RIGHT TO A SPEEDY TRIAL.

Pursuant to its powers under 28 USC §332, and in the exercise of its supervisory power over the administration of justice in the federal courts of the Second Circuit, the Circuit Council of the Second Circuit has promulgated rules designed to insure the prompt disposition of criminal cases. Rule 4 is as follows:

> In all cases the Government must be ready for trial within six months from the date of the arrest.... If the government is not ready for trial within such time, or within the periods extended by the District Court for good cause under Rule 5, and the defendant is charged only with non-capital offenses, then, upon application of the defendant... after opportunity for argument, the charge shall be dismissed.

Rule 5 enumerates various periods of time which may be excluded from the computation of time within which the government must be ready for trial. Rule 5 contemplates that pre-trial proceedings or other eventualities may

compel further postponement of trial. The fact remains, however, that Oliver was not brought to trial on the charges contained in Indictment No. 1973-269 until two years and three months after the day of his arrest. It is the defendant's contention that substantial periods of time in those twenty-seven months of delay are not covered by the exceptions set forth in Rule 5.

On October 13, 1972 Oliver was arrested and incarcerated on charges arising out of an incident in Berrien County, Michigan. (A-7) Seven days later, the United States Attorney for the Eastern District of Michigan successfully moved to dismiss removal proceedings which had been initiated by the United States Attorney for the Western District of New York. (A-6) From his arrest on October 13, 1972, until his appearance in Buffalo, New York, on July 30, 1973, Oliver was continuously in the custody of the State of Michigan. (A-3,7,8) Nine months and ten days of the delay in bringing him to trial in Buffalo is accounted for by the State of Michigan incarceration.

During that time Oliver was still under charges arising out of the Western District of New York. (A-5) Also during this time, Oliver and his attorney asserted Oliver's

rights to a speedy trial on the New York charge. (A-70 -72)

Rule 5(f) requires a prosecutor to make with due diligence reasonable efforts to produce a defendant for trial even though the defendant is detained in another district. The record shows that the prosecutor failed to comply with this requirement. It was not until March 21, 1973, that the prosecutor sought, by way of Writ of Habeas Corpus Ad Prosequendum, to produce the defendant in New York, and then, after consultation with the Michigan officials withdrew his Writ and declined further to insist on the defendant's presence. (A-1) Another Writ was not to be filed until July 12, 1973, a month after the conclusion of the defendant's Michigan trial. (A-1) Yet of the nine months and ten days that the defendant was incarcerated in Michigan, he spent only twenty-two days in actual court trial and other court appearances. (A-7 -8) It is the defendant's contention that Rule 5(f) does not empower the prosecuting attorney to decline to insist on a defendant's presence; it commands him to make, with diligence, reasonable efforts to secure such presence. In addition, Rule 5(a) permits time to be excluded from the six month rule only for

> ....proceedings for the determination of competency and the period during which he is incompetent to stand trial,

> pretrial motions, interlocutory appeals, trial of other charges and the period during which such matters are sub judice.

There is nothing in the phrasing of Rule 5(a), or in the statement of the Circuit Council accompanying the Rules, which indicates that it encompasses proceedings under charges unrelated to the charges in question. The only exception is clearly stated to be a "trial of other charges" and that appears to be limited to actual trial. Since this defendant was not arraigned under the New York indictment until July 30, 1973, the only period excludable from the time of arrest until the moment of arraignment, under Rule 5(a), would be the twenty-two days of actual trial and other court appearances in Michigan. But the period involving competency hearings, Forensic Center confinement, pretrial motions, and the time during which those matters were sub judice, should not be excludable under Rule 5(a), since they arose solely out of the Michigan charges. In short, the Rules do not allow for the exclusion of periods of time arising out of proceedings extraneous to the instant case.

POINT II

CONSENT TO THE WARRANTLESS SEARCH WAS NOT GIVEN VOLUNTARILY BY LINDA OLIVER

It is conceded that neither a valid warrant nor exigent circumstances need be demonstrated if it can be shown that a search was conducted pursuant to voluntary consent. Schneckloth vs. Bustamonte 412 U.S. 218 (1973). Here, however, it is evident that Linda Oliver did not voluntarily consent to the search of her automobile and her home. The United States Supreme Court in Schneckloth vs. Bustamonte stated that:

> In examining all the surrounding circumstances to determine if in fact consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possible vulnerable subjective state of the person who consents. ***
> Coercion is implicit in situations where consent to a warrantless search is obtained "under color of the badge" and the government must show that there is no coercion in fact.
>
> 412 U.S. at 224

When the FBI agents went to the home of Linda C. Oliver it was their intention to determine whether an

automobile alleged to have been used in a robbery and reported to belong to her was, in fact, present at her home. (A-101 - 102) It is submitted that when they set out to visit Linda Oliver on July 13, 1972, it was their intention to search the suspect automobile if they could locate it. (A-110) Further, it is submitted that they intended to seize whatever evidence they could uncover. (A-111) The clear import of Coolidge v. New Hampshire, 403 U.S. 443 (1971), is that when law enforcement agents proceed with such intent, they should first obtain a proper warrant. (See Coolidge, supra, at 488) A brief review of the occurrence will be helpful.

FBI Agent Farley and his men were notified by the Buffalo office that a Buffalo bank had been robbed by a Negro male driving a Chevrolet Camaro with a black vinyl top and a silver body. (A-90,91) The automobile reportedly bore a Michigan license plate with the number LGX-642. (A-90) The agent determined that the automobile belonged to Linda C. Oliver at 1042 Stafford Place, Detroit, Michigan. (A-90) Several times on the 12th of July, 1972, Agent Farley spot checked the residence for any sign of the automobile. (A-91) He then decided that sufficient time

had not passed for the automobile to return to Detroit from Buffalo. (A-101) He therefore waited until the morning of July 13, 1972, at which time, he proceeded to 1042 Stafford Place with at least six agents and three automobiles. (A-99,100) He deployed his men so as to cover all views of the house, and then knocked on the front door. (A-100) It is clear that at this point, not only did Agent Farley expect to find the automobile, but he also reasonably expected that the man who used it in Buffalo would be in the house. (A-101) The agents were ready to arrest Kenneth Oliver and they were ready to search for evidence and seize it. (A-102) Under these circumstances it is mandatory that search and arrest warrants be obtained. It is settled doctrine that mere probable cause to believe that certain articles subject to seizure are in a dwelling does not justify a search without a warrant. Agnello v. United States 269 U.S. 20 (1925) states that

> (s)ave in certain cases, as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful. ...Belief, however well founded, that an article sought is

> concealed in a dwelling
> house furnishes no
> justification for a search
> of that place without a warrant.
> And such searches are held
> unlawful notwithstanding
> facts unquestionably showing
> probable cause.
>
> 269 U.S. at 33

The government attempts to justify the failure of the FBI to obtain warrants by characterizing this as a warrantless search based on Linda C. Oliver's consent. Because a consent to search is a waiver of a constitutional right, it must not be lightly inferred. The prosecution has the heavy burden of showing that it was knowingly, freely and intelligently given. Bumpers v. North Carolina, 391 U.S. 543 (1968). Whether consent has been freely given or whether there has been mere submission to lawful authority must be determined by the facts and circumstances of the individual case.

Agent Bonney testified that after verifying that the automobile in Linda Oliver's garage was the automobile being sought, the agents "told her (they) wanted a search warrant for the car." (A-110) Bonney admitted that

Linda Oliver was at that point "visibly shaken". (A-109) After agents wrote out a purported consent form, Linda Oliver signed it, still nervous and surrounded by FBI agents. (A-110, 111) As Agent Bonney stated, "I didn't say she didn't have a reason to be nervous, I said she was nervous," (A-111) and "like you said, six FBI agents would make her nervous". (A-111) Prior to the signing of the form, the only search that had taken place was that by FBI agents to determine whether the suspect car was in Oliver's garage. (A-110) It was not seen from the outside, but only by passing through a door which led from the living room to the garage. (A-103) No consent had been requested from Linda Oliver prior to that time. After learning that the agents wanted a search warrant and after becoming very nervous, she was asked to sign a form which had been drawn up in five minutes in her home while six FBI agents were standing by. (A-110,111) In this atmosphere Linda Oliver manifestly was unable to give knowingly, freely and intelligently, her consent to a search of her automobile or her home. She was intimidated by the presence of several FBI agents, the knowledge that her automobile was the one they were looking for, and by their immediate request for a written consent form upon re-entering her home from her garage. The agents were not at a front

door, they were in her home, had been in her garage, and now were confronting her and telling her they wanted to search her automobile. Her consent was not unequivocal, specific and intelligently given, for it was a product of implicit coercion.

POINT III

THE STIPULATION ENTERED INTO DOES NOT JUSTIFY A FINDING OF GUILT UNDER COUNT III OF THE INDICTMENT CHARGING A VIOLATION OF TITLE 18 USC 2113 (d)

Subdivision (d) of Section 2113 of Title 18 creates a crime commonly referred to as aggravated bank robbery. The elements are, (1) an offense defined in either Subsection (a) or (b) of Section 2113 of Title 18 and, (2) an assault or the placing in jeopardy of the life of any person by the use of a dangerous weapon or device during the course of such an offense.

Assuming, arguendo, that a violation of either Subsection (a) or (b) of Section 2113 of Title 18 has been made out by the stipulation, the question then remains whether such violation was accompanied by either an assault or the placing of life in jeopardy.

In defining the term "assault" as used in Subsection (d), the Court in Bradley vs. United States 447 F2d 264 (8th Cir. 1971), concluded that,

> in its aggravated sense, assault within subsection (d) means more than having intent to do; in fact,

> (it means) that which generates a reasonable apprehension in a victim. It means, in addition, a threat or attempt to inflict bodily harm coupled with the present ability to commit violent injury upon the person of another. (447 F2d at 273, emphasis supplied)

Conduct amounting to a felonious entry into a bank, taking money by force and violence or by intimidation, plainly is provided for in subsection 2113(a). The Bradley opinion warns that to uniformly define assault in every instance would be improper. It is apparent from an overall reading of Section 2113 that the Congressional intent is that assault (under subsection (d)) is not intended to be consummated simply by mere proof of the actor's apparent intent and a reasonable apprehension of a victim. Such conduct would more properly fit, if anywhere, within the "felonious entry and taking of money by force and violence, or by intimidation" as provided for in subsection 2113 (a).

Meyers vs. U.S., 116 F2d 601 (5th Cir., 1940), confirms the foregoing viewpoint by holding that the mere putting in fear does not constitute assault, or actual jeopardy to the life of a person.

As to the second possible way of committing an aggravated robbery, it is submitted that the stipulations similarly do not justify a finding that lives were placed in jeopardy. The term jeopardy was defined by the Court in United States vs. Roach, 321 F2d 1 (3rd Cir., 1963) when it stated that,

> jeopardy means actual jeopardy and not merely that the victim thought he was in jeopardy.
>
> 321 F2d at 5

Significantly, the only proof relevant to the gun indicates that it was unloaded. (A-32) This factor is critical, for in United States v. Marshall, 427 F2d 434 (2d Cir., 1970), the court noted that the jeopardy provision of the same subsection; that is, if the court were not to require a finding that lives were objectively in danger in order to find jeopardy, it would be impossible to distinguish subsection (d) from subsection (a). (See Thomas v. U.S., 418 F2d 567 (5th Cir. 1969).

We urge that this court accept a construction of Section 2113 of Title 18 which gives effect to all of its terms.

POINT IV

THE STIPULATION ENTERED INTO DOES NOT JUSTIFY A FINDING OF GUILT UNDER COUNT I OF THE INDICTMENT CHARGING A VIOLATION OF TITLE 18 USC 2113 (a)

The stipulation entered into does not justify a finding of guilt under subsection (a), Section 2113 of Title 18. Elements essential to a finding of guilt under subdivision (a) are a taking by force and violence, or by intimidation. It is readily apparent from a reading of this subdivision that the statute sets forth two alternate conditions, not three. That is, the government may not rest upon a showing of force or violence or intimidation. Rather it must prove both force and violence or, alternatively, intimidation. This viewpoint has been affirmed in United States v. Jacquillon, 469 F2d 380 (5th Cir., 1972). (See also Cunningham v. United States, 356 F2d 454 (5th Cir. 1966).)

Black's Law Dictionary defines "violence" as

> "an unjust or unwarranted exercise of force, visually with the accompaniment of vehemence, outrage, or fury".

Nowhere in the stipulation entered into is there testimony that the alleged defendant exercised such violence. On the contrary, it is clear that the incident took place in an atmosphere which permitted the bank employees to cooly and efficiently follow their contingency plan. (A-29, 37, 38)

The alternate element under subdivision (a) is intimidation. In Jacquillon, "intimidation" was defined as "to make fearful or to put into fear." The stipulations entered into are devoid of any indication from any of the bank employees that they were intimidated or fearful. In fact the employees appeared to have acted cooly and efficiently, following a plan designed for apparent robberies, including the adding of bait currency to the proceeds of the robbery. (A-29, 37, 38)

It is submitted that the proof is insufficient to establish either the use of violent force or intimidation, and accordingly a finding of guilt under Subsection (a) of Section 2113 of Title 18 is not justified.

CONCLUSION

THIS COURT SHOULD FIND THAT THE DEFENDANT WAS DENIED A SPEEDY TRIAL AND SHOULD THEREFORE DISMISS THE INDICTMENT. ALTERNATIVELY THIS COURT SHOULD REVERSE THE JUDGMENT OF CONVICTION AND GRANT THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM LINDA OLIVER'S HOME AND AUTOMOBILE. ALTERNATIVELY THE COURT SHOULD DETERMINE THAT VIOLATIONS OF SUBSECTIONS (A) AND (D) OF §2113 OF TITLE 18 WERE NOT PROVEN AND REVERSE THE CONVICTIONS UNDER COUNTS I & III OF THE INDICTMENT HEREIN.

Respectfully Submitted,
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

KENNETH OLIVER

Appellant.

AFFIDAVIT

No. 74-2412

STATE OF NEW YORK)
COUNTY OF E R I E) ss:
CITY OF BUFFALO)

VINCENT MORGAN, being duly sworn deposes and says:

1. That he is over 18 years of age and a Law Clerk for the law firm of DOYLE & DENMAN.

2. That on January 2, 1974, he personally delivered to the United States Attorney's Office for the Western District of New York, a copy of the Brief and Appendix in case of United States of America vs. Kenneth Oliver in the United States Court of Appeals for the Second District No. 74-2412.

3. That such service was accomplished by personally delivering to Theodore J. Burns, the Assistant United States Attorney in charge of the above mentioned case.

Vincent Morgan

Vincent Morgan

Sworn to before me this
2nd day of January, 1975.

James B. Denman

JAMES B. DENMAN
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19[illegible]

DOYLE & DENMAN
ATTORNEYS AT LAW